86-674

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JOAN S. TOZER, KATHERINE S. TOZER, LINDSAY M. TOZER,

Petitioners,

v.

LTV CORPORATION, JONES & LAUGHLIN INDUSTRIES, INC., VOUGHT CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals, Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. DOES THE DOCTRINE OF SEPARATION OF POWERS IMMUNIZE A PRIVATE CONTRACTOR WHO NEGLIGENTLY AND DEFECTIVELY DESIGNS EQUIPMENT AND SELLS THE SAME TO THE UNITED STATES GOVERNMENT?

II. IS A PRIVATE CONTRACTOR WHO SOLD EQUIPMENT TO THE MILITARY AND WHO HAS BEEN FOUND NEGLIGENT IN THE DESIGN OF THAT EQUIPMENT AND TO HAVE IT DESIGNED IN SUCH A WAY AS TO MAKE IT UNREASONABLY DANGEROUS, RESULTING IN THE DEATH OF A PERSON WHO USES IT, IMMUNE FROM LIABILITY DESPITE ITS NEGLIGENCE AND UNREASONABLE CONDUCT?

III. IS A PRIVATE CONTRACTOR WHO SOLD EQUIPMENT TO THE MILITARY AND WHO HAS BEEN FOUND TO BE NEGLIGENT IN THE DESIGN OF THAT EQUIPMENT AND TO HAVE DESIGNED IT IN SUCH A WAY AS TO MAKE IT UNREASONABLY DANGEROUS, RESULTING IN THE DEATH OF A PERSON WHO USES IT, IMMUNE FROM LIABILITY EVEN WHERE THE PRIVATE CONTRACTOR MAY HAVE HAD SIGNIFICANT DISCRETION AND LATITUDE IN THE DESIGN PROCESS?

IV. ABSENT SPECIFIC LEGISLATION, DOES THE COURT HAVE JURISDICTION TO ABROGATE A PERSON'S TRADITIONAL COMMON LAW RIGHT TO RECOVER DAMAGES AGAINST A PARTY FOUND TO BE NEGLIGENT?

V. WHAT ARE THE PROPER CRITERIA FOR THE ESTABLISHMENT OF A GOVERNMENT

CONTRACTOR DEFENSE, AND SHOULD STATE OR FEDERAL LAW APPLY?

PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings below subject to this petition for writ of *certiorari* are set forth in the caption of the case.

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OPINIONS IN THE COURTS BELOW

The opinion of the Fourth Circuit Court of Appeals was issued on May 27, 1986 under the caption *Tozer v. LTV Corp.*, No. 84-1907 (L), 84-1962. The opinion appears at 792 F.2d 403 (4th Cir. 1986), and is reproduced in the Appendix of the Petition.

The Judgment of the United States District Court for the District of Maryland in favor of the plaintiffs was issued on July 29, 1983, Civil Case No. HM-81-2134. The District Court's Memorandum and Order denying defendant's motion for judgment notwithstanding the verdict, dated July 28, 1984, is reproduced in the Appendix.

STATEMENT OF GROUNDS OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on May 27, 1986. A writ of certiorari is sought from this Court pursuant to provisions of 28 U.S.C. § 1254(1) (1948).

CONSTITUTIONAL PROVISIONS AND STATUTES

1. United States Constitution Art. 1, § 8, Clauses 11-14:

The Congress shall have power . . . .

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces

. . . . . .

2. U.S. Constitution Art. 2, § 2, Clause 1:

§ 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective offices, and he shall have Power to grant Reprieves and Pardons of Offenses against the United States, except in Cases of Impeachment.

STATEMENT OF THE CASE

On August 28, 1980, Lt. Commander Eliot Tozer was killed when the Navy plane he was flying crashed into the high seas after being launched from the aircraft carrier, U.S.S. Kitty Hawk, which was operating approximately 100 miles off the coast of San Diego, California. His widow, Joan Tozer, and his two minor children brought an action against the defendants under the Death On The High Seas Act (DOHSA), 46 U.S.C. §§ 761-768 (1920), and General Maritime Law, alleging a defect in the design of a modification to the aircraft.

The subject modification was proposed by the defendants and submitted to the military by an Engineering Change Proposal. The modification consisted of the installation of hinged access panels on both the left and right side of the aircraft fuselage just behind the cockpit, so as to facilitate access to

the area beneath. These access panels were collectively known as the "Buick Hood", reminiscent of the hoods on old Buick automobiles. After the defendants' proposal was accepted, the defendants designed the modification and drew up the specifications necessary to implement the modification. The Navy approved the specifications, which was a necessary step for procurement.

The plaintiffs alleged that the access panels simply did not contain a sufficient number of fasteners along their forward leading edges. The fasteners which were used were known to become loose and malfunction on occasion. The plaintiffs showed that the single fastener on the center of the forward edge of the access panel on the right hand side of the aircraft loosened, resulting in the separation of that panel while the aircraft was in flight. The pilot ejected from the aircraft; however, neither his body nor the aircraft were recovered. The jury found that the manufacturer was negligent as well as strictly liable for the resulting death.

Notwithstanding the fact that the defendant failed to plead it as an affirmative defense, the jury was charged with the elements of the so called "government contractor defense" as set forth in the case of *McKay v. Rockwell International Corp.*, 704 F.2d 444 (9th Cir., 1983), *cert. denied*, 464 U.S. 1043 (1984). Because in the *McKay* case this defense was applied only to strict liability, the district court denied the defendant's motion for judgment notwithstanding the verdict and a new trial in which the defendants requested that the defense be expanded to relieve them from the jury's finding that they were liable for neg-

ligent conduct in the design of the said modification (Memorandum and Order of July 25, 1984, annexed).

The Fourth Circuit, however, reversed the decision of the lower court entered in accordance with the verdict, on the grounds of a separation of powers theory—that courts are simply not competent to comprehend the design of military equipment—and that, essentially, the government contractor defense must totally immunize the manufacturer, even from the consequences of its own negligence in the design of a product.

ARGUMENT

I. INTRODUCTION

The decision of the Fourth Circuit in this case is in direct conflict with *Shaw v. Grumman Aerospace Corporation*, 778 F.2d 736 (11th Cir. 1985), a case remarkably similar to the instant case as described below. A petition for *certiorari* is pending in that case (Petition Number 85-1529), and the United States Solicitor General has been asked to file an *amicus curiae* brief on the question of whether the *certiorari* should be granted. Subsequently, a petition for *certiorari* has been filed in a companion case, *Dowd v. Textron, Inc.*, 792 F. 2d 409 (4th Cir. 1986), handed down by the Fourth Circuit concurrently with the instant case (Petition Number 86-379).

Not only is the Fourth Circuit's decision in the instant case in conflict with that of the Eleventh Circuit, but also it is, in varying degrees, divergent from the Third, Fifth, Seventh and Ninth Circuits on this issue. Additionally, among those circuits which have ostensibly decided in favor of the application of the

government contractor defense, the variance in legal interpretation and application to the facts in each case results in substantial confusion even among those circuits. Furthermore, the Fourth Circuit's decision in the instant case and in *Dowd*, the companion case, uniquely relies on a separation of powers theory, declaring judicial incompetence to resolve the factual issues, essentially rendering any manufacturer who proposes, designs and sells military equipment free of accountability for torts, regardless of the military or non-military status of the victim.

The ramifications of the government contractor defense are national in scope, affecting the military/industrial complex, the insurance industry and victims of negligently designed equipment. Moveover, the theory applied by the Fourth Circuit in the instant case erodes the traditional common law concept of accountability for the consequences of one's own negligence. It is respectfully submitted that present judicial positions are so diverse and uncertain regarding this defense that a review by this Court would be timely and appropriate.

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE A DIRECT CONFLICT BETWEEN THE FOURTH AND THE ELEVENTH CIRCUIT COURTS OF APPEAL AND WITH AND AMONG AT LEAST FOUR OTHER CIRCUITS REGARDING THE LIABILITY OF INDEPENDENT CONTRACTORS WHO SELL EQUIPMENT TO THE MILITARY, AN ISSUE OF NATIONAL IMPORTANCE.

Although the government contractor defense may have roots in older cases, the contemporary application to military equipment first appears in *In re Agent Orange Products Liability Litigation*, 534 F. Supp.

1046 (E.D.N.Y. 1982), *cert. denied*, 465 U.S. 1067 (1984), This case involved a suit against a manufacturer for deaths and injuries from the chemical toxin, dioxin, which was manufactured in accordance with specifications established by the military. The Court held that the defense would prevail if the manufacturer complied with the specifications provided by the government and that the government knew as much, or more, than the defendant about the hazards of the product. However, the court took the position that a supplier could be held liable for damages where it possessed knowledge superior to the military, but failed to apprise the military of that knowledge. This duty to inform the military of risks known through the superior knowledge of the supplier about the risks inherent in a particular product would allow the military to make an informed decision after weighing such risks against the military necessity for the product as designed.

The *In re Agent Orange* case does not address situations where the manufacturer, rather than the government, establishes proposals and specifications. Likewise, the case does not address situations where the danger in the design or use of the product should be known by the application of principles of due care. Nevertheless, the Fourth Circuit's reasoning in the instant case necessarily rejects the *In re Agent Orange* standard as it has developed thus far.

The criteria for the defense more recently referred to by the courts appear in the *McKay* case. The *McKay* doctrine would shield a manufacturer from strict liability for the design of military equipment if the manufacturer is able to prove affirmatively that the specifications for the equipment were provided by

the government or that the government approved reasonably detailed specifications and the manufacturer warned of any dangers in the design or use of which it was solely aware. The defense in *McKay* is explicitly predicated on requirements that the government be immune from suit under *Feres v. United States*, 340 U.S. 135 (1950) and *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977). Since *McKay* applies only to strict liability, it is uncertain whether the Ninth Circuit intended that a defendant who is found to have breached a duty of due care causing a death or injury under similar circumstances should be immune from the consequences and accountability for its negligent conduct as the Fourth Circuit has held in the instant case.

The Fourth Circuit may be in conflict also with the Seventh Circuit. The Seventh Circuit's position is set forth in the case of *Tillett v. J. I. Case Co.*, 756 F.2d 591 (7th Cir. 1985). In that case the government established specifications for a front-end loader and purposely chose to delete a roll bar installation, although the resulting danger was obvious. The manufacturer was relieved of the duty of due care by the informed government decision and thus was not the responsible party, so the Seventh Circuit applied what it thought would be the law of Wisconsin to affirm the dismissal of the case. The court, while noting that *McKay* applied to strict liability only, nevertheless stated in *dicta*, without giving the reasoning therefor, that the defense would apply as well to design defect cases based upon negligence and warranty claims. Under the particular fact scenario of that case, where the manufacturer was compelled to act in a specified manner, such a statement might be understandable. How-

ever, there is no definite indication that the Seventh Circuit would hold that a manufacturer should be summarily protected from the consequences of its own negligence, particularly where a manufacturer had latitude in working up the design and specifications as the defendants had in the instant case.

The Fourth Circuit appears to be in conflict with the Third Circuit, although the Third Circuit's application of *McKay* is likewise uncertain, particularly considering the more recent cases. In *Brown v. Caterpillar Tractor*, 696 F.2d 246 (3rd Cir. 1982), the court relied on state law in the application of the government contractor defense, stating that if the court were "writing on a clean slate, or were ourselves fashioning the law of Pennsylvania, we might well be persuaded that a contractor must prove some degree of compulsion" in order to prevail. 696 F.2d at 254. The Third Circuit spoke again in *Koutsoubos v. Boeing Vertol*, 755 F.2d 352 (3rd Cir.), *cert. denied*, 106 S. Ct. 72 (1985), but instead of writing on a clean slate, it applied a hybrid of *McKay* and *In re Agent Orange* in the context of federal common law. However, the court noted that the facts supporting the defense showed that the military chose the material design and established the specifications for the product. The military assessment of risk and necessity thus intervened and relieved the defendant of responsibility for the design. Therefore, there was no supplier's negligence with which to deal in that case.

The Third Circuit most recently addressed the government contractor defense in the case of *In re Air Crash Disaster at Mannheim, Germany*, 769 F.2d 115 (3rd Cir. 1985), *cert. denied*, 106 S. Ct. 851 (1986). The court applied *McKay*, but recognized that the

"approval" requirement of reasonably precise specifications may not establish the defense without a showing that such approval was made "after a substantial review of the specifications", an element not present in the *McKay* standard. *Mannheim*, 769 F.2d at 123. The court reviewed evidence which proved that the government knew of the hazard inherent in the design of the product and had purposely rejected modifications proposed by the manufacturer to eliminate the hazard. Again, the facts addressed by the court would eliminate the responsibility on the part of the defendant.

The Eleventh Circuit most recently rejected the *McKay* approach to the defense in deciding *Shaw v. Grumman Aerospace Corporation*, 778 F.2d 736 (11th Cir. 1985). The *Shaw* case presents a factual scenario which is remarkably similar to that of *Tozer*, the instant case. As in the instant case, the manufacturer submitted an Engineering Change Proposal for the modification of an A-6 bomber aircraft. The Navy approved reasonably precise specifications and the modification was installed, but there was no provision for redundancy in case of failure of the subject component. As a result of a failure of that part and the lack of redundancy, the subject aircraft crashed just after launch from the aircraft carrier U.S.S. Constellation, which was operating approximately 100 miles off the coast of San Diego, California. A suit was brought for the death of the pilot against Grumman under the Death on the High Seas Act (DOHSA). 46 U.S.C. §§ 761-768 (1920). Again, as in the instant case, the manufacturer in the *Shaw* case drew up the precise specifications and had latitude in their formulation. The latitude given the manufacturer gave

rise to a duty of due care in the design of the modification. The manufacturer was found to have been negligent in fulfilling that duty, notwithstanding the fact that the Navy may have approved the precise specifications for purchase. *Shaw v. Grumman Aerospace Corp.*, 593 F. Supp. 1066 (S.D. Fla. 1984).

While an appeal to the Eleventh Circuit was pending in the *Shaw* case, the Fifth Circuit addressed the government contractor defense in the case of *Bynum v. FMC Corp.*, 770 F.2d 556 (5th Cir. 1985). Unlike *Shaw*, *Bynum* did not deal with specifications designed by the defendant, but by the government. In *Bynum*, the court applied the government contractor defense as a matter of federal common law to affirm the granting of summary judgment in favor of the defendant, noting that the defendant had no discretion to deviate from the design specifications provided by the government. The court, accepting *Shaw*, expressly left open the situation where the manufacturer furnishes the specifications and the government merely approves them. *Bynum*, 770 F.2d at 575 nn.25 and 27.

In affirming the *Shaw* case, the Eleventh Circuit expressed doubt with the *McKay* rationale, but recognized the separation of powers doctrine, deferring to the military decisions to use weapons systems designed by an independent contractor, despite risks inherent in the product. The court went on to hold, however, that the task of the court is to inquire whether such a military decision was actually made. If it was not, the court would apply standard principles of product liability law. The court set out a general rule that the military contractor will be liable, as is any other contractor, to servicemen injured by

defects in products for which it provides detailed, precise and typically quantitative specifications. *Shaw*, 778 F.2d at 745-746. The court then set out the defense as follows:

> A contractor may escape liability only if it affirmatively proves: (1) that it did not participate, or participated only minimally, in the design of those products or parts of products shown to be defective; *or* (2) that it timely warned the military of the risks of the design and notified it of alternative designs reasonably known by the contractor, *and* that the military, although forewarned, clearly authorized the contractor to proceed with the dangerous design.

Shaw, 778 F2d. at 746 (emphasis in text).

In *Tozer*, the Fourth Circuit expressly rejected the reasoning in *Shaw*, declaring that the judgement made in *Shaw* is "not a matter for the judicial economist but for the Executive in its dealings with contractors and for Congress in defining the scope of immunities under the Federal Tort Claims Act" *Tozer*, 792 F. 2d at 408. Nevertheless, the Fourth Circuit did what it said it could not do and embarked upon socio-economic assumptions about the military/industrial complex to rationalize away a manufacturer's accountability for wrongdoing as provided by traditional concepts of common law. The Fourth Circuit abrogates common law in a summary fashion and protects a manufacturer from the consequences of its wrongdoing if the manufacturer simply presents a statement that "reasonably precise specifications" were "approved" by the government.

The *Tozer* court overlooks the reality that nearly everything purchased by the military is done so under defense acquisition regulations. Because of this, purchases are preceded by "reasonably precise specifications" and a government "approval." As stated in an authoritative text:

> Nearly every procurement begins with an attempt by Government officials to identify their agency's basic needs and to formulate a description of work to be required under a contract which will satisfy those needs. This description of desired performance may be included in drawings, technical documents, product descriptions and other technical conditions . . . . . collectively referred to as the "specifications."

J. Cibinic, Jr. and R. C. Nash, Jr., *Formation of Government Contracts* 188 (1982).

Specifications fall into three general categories: design, performance and functional specifications, all of which must be reasonably precise and require an "approval" before the particular product is purchased. *See, e.g.*, J. Cibinic, Jr. and R.C. Nash, Jr., *Formation of Government Contracts 189-215* (1982). If the *Tozer* approach were to prevail, tort immunity would be provided summarily to manufacturers of nearly all products purchased by the military regardless of the degree of latitude given to the manufacturer or the resulting responsibility for the design, development and sale of the product. The *Shaw* approach at least provides for a factual inquiry in this regard, while *Tozer* forecloses such inquiry.[1]

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[1] In *Tozer*, defendants failed to plead the government con-

The confusion among the circuits, particularly the express conflict between the Fourth and Eleventh Circuits, affects not only the outcome of many cases involving defects in the design of military equipment, but also decisions on the part of attorneys as to whether to accept such cases. It would appear that the Third, Fifth, Seventh and Ninth Circuits, while perhaps foreclosing strict liability, may allow findings of negligence on the part of manufacturers who have a significant role and latitude in the origination and development of designs and specifications. The Eleventh Circuit at least recognizes the fact-sensitive nature of the terms "reasonably precise specifications" and "approval." Opposing such an approach, the Fourth Circuit would have a case dismissed as long as there were "reasonably precise specifications" and an "approval" by the government. This approach essentially eliminates, without a factual inquiry, suits concerning nearly all equipment purchased by the military.

Additionally, notwithstanding the government contractor defense, the Fourth Circuit declares incompetency on the part of judges and juries, stating that "[w]hile jurors may possess familiarity and experience with consumer products, it would be the rare juror—or judge—who has been in the cockpit of a Navy RF-8G off the deck of a carrier on a low level, high speed fly-by maneuver." *Tozer*, 792 F. 2d at 406, inferring that specialized juries would be required for complex cases. The ultimate logic of this statement precludes even suits brought by non-military person-

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tractor defense as an affirmative defense as required. The Fourth Circuit's position was that the mere approval of specifications by the military rendered the question moot.

nel, thus eliminating the governmental immunity predicate set forth in *McKay*. Thus, the Fourth Circuit goes far beyond *McKay*.

The enormous potential economic impact on the victims of negligence, the defense industry and those insuring it underlies the national importance and far-reaching effect of this issue. Such concerns have been inherent in the rationales set forth by the circuit courts as they have wrestled with the question of the government contractor defense. These rationales are polarized most clearly between the Eleventh Circuit in *Shaw* and the Fourth Circuit in *Tozer*.

For example, one of the unsupported assumptions for the government contractor defense as expressed in some of the cases, including *Tozer*, is that it will enable manufacturers to work more closely with the government and thus be free to push to the limits of technology. *McKay*, 704 F. 2d at 449-450; *Tozer*, 792 F. 2d at 407. This rationale is more adequately served by the detailed factual inquiry of *Shaw*. Where any product can reasonably be anticipated to have risk, the use of the *Shaw* inquiry would have the effect of encouraging government contractors to seek full knowledge on the part of the military concerning such risks. Where a product would push the limits of technology, full disclosure by the contractor would allow the military a better basis upon which to balance risk against military necessity. It must be noted that many of the products which are purchased by the military do not involve any cutting edge of any technology, and there has been little, if any, support submitted indicating that manufacturers of military equipment

have been holding back on their responsibility because of the presence of a legal system which enforces such responsibility.

Confusion inherent in the term, "military equipment," also makes uncertain the various applications of the defense. Although the parameters of the term have not been defined by any of the cases, the Seventh Circuit in *Tillett* suggests that it might include jeeps, tractors and even pizza machines. 756 F.2d at 598. If this were true, then in view of the procurement requirements and procedures noted *supra*, and the Fourth Circuit's rendition of the defense, immunity from tort liability would extend to manufacturers of nearly all types of products no matter who was hurt so long as the military bought the product.

Another rationale for the defense expressed by *McKay*, and adopted by *Tozer*, is predicated on another judicial assumption about the military/industrial complex: that costs of litigation would result in higher prices passing through to the government. The troubling aspect of this rationale is that such costs would be shifted to the victims, including the families of service people, a socio-economic decision which the *Tozer* court admits should not be made by the judiciary.

Additionally, the *Tozer* decision justifies the abrogation of the applicability of the tort system to manufacturers of military equipment by implying that it is part of the privilege of being a serviceman to accept not only the risks of war, but also the risk that our manufacturers will be negligent. 792 F. 2d at 407. This approach to the question should not be heard to rationalize the shifting of the consequences of any defendant's negligent conduct to an innocent victim.

Admirably, service people accept the risks inherent in their profession. However, it would be a disservice to convert that admirable committment into an excuse for the negligent conduct of an independent contractor. To state summarily the notion that the judicial system is incapable of winnowing through factual questions to determine whether the military had made an informed decision is to condemn service people to endure the sort of risk that the law does not suffer other citizens to endure. There is simply no reason or justification for the judiciary literally to permit a selected private entity to be negligent without accountability.

CONCLUSION

After all the evidence was presented in the instant case, including the fact that the government "approved" the defendants' specifications and design changes, the jury found the defendants to have been responsible for negligent conduct. In denying the plaintiffs' right to recover, the Fourth Circuit has fashioned yet another standard by which to excuse a government contractor's negligent conduct.

Certiorari, therefore, should be granted for this Court to review and overturn the Fourth Circuit's decision on this nationally important issue.

RESPECTFULLY SUBMITTED,

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APPENDIX

APPENDIX A

United States Court of Appeals,
Fourth Circuit

Nos. 84-1907(L), 84-1962.

JOAN S. TOZER, surviving widow of Eliot F. Tozer, deceased and to her own use and benefit and to the use and benefit as mother and next friend of: Katherine S. Tozer, surviving minor child of Eliot F. Tozer, deceased and; Lindsay M. Tozer, surviving minor child of Eliot F. Tozer, deceased and; Joan S. Tozer, personal representative of the estate of Eliot F. Tozer, deceased,

Appellees,

v.

LTV CORPORATION, a Texas Corporation; Jones & Laughlin Industries, Inc.; Vought Corporation, a Delaware Corporation,

Appellants.

BELL HELICOPTER TEXTRON, LOCKHEED CORP., MCDONNELL-DOUGLAS CORP., UNITED TECHNOLOGIES CORP.,

Amici Curiae.

JOAN S. TOZER, surviving widow of Eliot F. Tozer, deceased and to her own use and benefit and to the use and benefit as mother and next friend of: Katherine S. Tozer, surviving minor child of Eliot F. Tozer, deceased and; Lindsay M. Tozer, surviving minor child of Eliot F. Tozer, deceased and; Joan S. Tozer, personal representative of the estate of Eliot F. Tozer, deceased,

Appellants,

v.

LTV CORPORATION, a Texas Corporation; Jones & Laughlin Industries, Inc.; Vought Corporation, a Delaware Corpo-

ration,

Appellees.

BELL HELICOPTER TEXTRON, LOCKHEED CORP., MCDONNELL-DOUGLAS CORP., UNITED TECHNOLOGIES CORP.,

Amici Curiae.

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(Lewis T. Booker, L. Nel Ellis, Jr.; Hunton & Williams, Richmond, Va., on brief), for amici curiae.

Before RUSSELL, HALL and WILKINSON, Circuit Judges.

WILKINSON, Circuit Judge:

In 1980, Lieutenant Commander Eliot Tozer was killed when the Navy plane he was piloting crashed. His widow, Joan Tozer, and his two minor children brought an action against LTV Corporation and its subsidiary Vought Corporation under the Death on the High Seas Act (DOHSA) 46 U.S.C. § 761 *et seq.* and general maritime law, alleging the defective design of a modification to the airplane. The jury returned a verdict in favor of the plaintiffs. Because the government contractor defense shields the contractor from liability for design defects under either a strict liability or a negligence theory when the government has approved reasonably detailed specifications, we reverse and remand for entry of judgment in favor of the defendants.

I.

Tozer's crash occurred off the coast of California while his plane was executing a low-altitude, high speed fly-by of its carrier, the U.S.S. Kitty Hawk. At trial, Joan Tozer

contended that the plane had crashed because a panel known as the "Buick Hood" had come off in mid-flight, causing him to lose control of his Navy RF-8G Reconnaissance plane. The Buick Hood is a hinged panel that permits access to the equipment underneath so that it can be repaired and maintained; the panel should not open during flight.

When the RF-8G was first designed, it had a one-piece panel that wrapped around the top of the aircraft. In order to do maintenance or repair work in the compartment below, the whole panel had to be removed. The Navy asked Vought to modify the panel so that the systems beneath it could be more easily and quickly maintained. Vought cut the panel into three pieces, fixing the center piece to the aircraft, and hinging the two outer pieces along the center line. The non-hinged sides of the hood are fastened with "camlocs," quick fasteners which can be released by a turn of a screwdriver. Tozer contends that it is well known that camlocs often come loose, because of wear, vibration, or corrosion, and that usually many camlocs are installed for safety. Tozer said that Vought was negligent because it did not fasten the panel with redundant camlocs.

Vought contended the design had been carefully analyzed, tested, and found adequate. More fundamentally, Vought argued that it could not be found liable for the design of the aircraft since the Navy had approved it, and the company shared the United States' immunity through the government contractor defense. The district judge instructed the jury that the government contractor defense precluded recovery on the basis of strict liability, but did not instruct the jury on the defense with respect to negligence. The jury returned a special verdict, finding that defendants were negligent in the design of the Buick Hood modification and that the U.S. Navy had reviewed and approved reasonably detailed specifications for the Buick Hood modification. The jury awarded $350,000 to Joan Tozer, and $50,000 to each of her two daughters.

Vought contends that the district judge should have instructed the jury that the government contractor defense precludes recovery for negligence as well as strict liability. We agree that the defense applies here to prevent recovery under either theory and reverse and remand for entry of judgment notwithstanding the verdict in favor of Vought.[1]

II.

Traditionally, the government contractor defense shielded a contractor from liability when acting under the direction and authority of the United States. *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 20, 60 S.Ct. 413, 414, 84 L.Ed. 554 (1940). In its original form, the defense covered only construction projects, *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 448 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043, 104 S.Ct. 711, 79 L.Ed.2d 175 (1984). Its application to military contractors, however, serves more than the historic purpose of not imposing liability on a contractor who has followed specifications required or approved by the United States government. It advances the separation of powers and safeguards the process of military procurement. We consider each of these values in turn.

The judicial branch is by design the least involved in military matters. "The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches." *Gilligan v. Morgan*, 413 U.S. 1, 10, 93 S.Ct. 2440, 2446, 37 L.Ed.2d 407 (1973) (emphasis in original). Judges possess no power "To de-

[1] We do not accept Tozer's argument that defendants waived the government contract defense by not setting it out in their answer. As the district court noted, the delay "was primarily due to the fact that the *McKay* case, which was the sole authority cited in their motion, had only recently been decided."

clare War . . . To raise and support Armies . . . To provide and maintain a Navy." U.S. Const. art. 1, sec. 8, cl. 11-13. Nor have they been "given the task of running the Army," *Orloff v. Willoughby,* 345 U.S. 83, 93, 73 S.Ct. 534, 540, 97 L.Ed. 842 (1953). In the face of a "textually demonstrable" commitment of an issue to "a coordinate political department," *Baker v. Carr,* 369 U.S. 186, 217, 82 S.Ct. 691, 710, 7 L.Ed.2d 663 (1962), judicial caution is advisable. Even apart from matters of constitutional text, the reservation of judicial judgment on strictly military matters is sound policy. The judicial branch contains no Department of Defense or Armed Services Committee or other ongoing fund of expertise on which its personnel may draw. Nor is it seemly that a democracy's most serious decisions, those providing for common survival and defense, be made by its least accountable branch of government.

It is difficult to imagine a more purely military matter than that at issue in this case—the design of a sophisticated reconnaissance craft that was flying, on the day of Tozer's death, some 50 to 75 feet above the surface of the water at a speed of 500-550 nautical miles per hour. It should be axiomatic that "considerations of cost, time of production, risks to participants, risks to third parties, and any other factors that might weigh on the decisions of whether, when, and how to use a particular weapon, are uniquely questions for the military and are exempt from review by civilian courts." *In re Agent Orange Product Liability Litigation,* 534 F.Supp. 1046, 1054 n. 1 (E.D.N.Y.1982).

Here, however, the jury was invited to "second-guess military decisions," *see United States v. Shearer,* ___ U.S. ___, 105 S.Ct. 3039, 3043, 87 L.Ed.2d 38 (1985), and to judge the design of a Navy-approved aircraft. Special interrogatory number one inquired of the jury whether defendants were "negligent in the design of the Buick Hood modification," and interrogatory five questioned

whether the hood was "defective in that its design rendered it unreasonably dangerous." A group of laymen was thus ineluctably thrust into the intricacies of military technology involving, in the word of the district court, "the structural reaction of the modified Buick Hood panel to aerodynamic forces and loads experienced by the aircraft."

These are judgments, however, which lay men and women are neither suited nor empowered to make. There is a danger in transporting the rubric of tort law and products liability to a military setting and military technology. While jurors may possess familiarity and experience with consumer products, it would be the rare juror—or judge—who has been in the cockpit of a Navy RF-8G off the deck of a carrier on a low level, high speed fly-by maneuver. Moreover, "the United States is required by the exigencies of our defense effort to push technology towards its limits and thereby to incur risks beyond those that would be acceptable for ordinary consumer goods." *McKay,* 704 F.2d at 449-50. What would pose an unreasonable risk to the safety of civilians might be acceptable—or indeed necessary—in light of the military mission of the aircraft. *Cf.* Note, *McKay v. Rockwell International Corp.: No Compulsion for Government Contractor Defense,* 28 St. Louis U.L.J. 1061, 1071 (1984) ("Plaintiff's comparison of the jeep to a civilian passenger vehicle was inappropriate since the two vehicles were not made for similar uses.") Difficult choices, tradeoffs, and compromises inhere in military planning that simply find no analogue in civilian life. "This is not to say that [military] designers are unconcerned with safety. Rather, they attempt to design as safe a plane as possible within the scope of its mission." *Kropp v. Douglas Aircraft Co.,* 329 F.Supp. 447, 456 (E.D.N.Y.1971).

The defense protects against judicial interference in military matters in other ways as well. We cannot accept the view that "the danger of interfering with [military] discipline in military contractor cases 'is too remote to be

accorded significant weight when the decision only indirectly involves military orders or practices concerning active duty soldiers.' " *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736, 743 (11th Cir. 1985), *quoting Cole v. United States,* 755 F.2d 873, 879 (11th Cir. 1985). The fact that the challenge here does not involve Tozer's immediate commanding officer or relate to matters of personal discipline is irrelevant. Military contractors ordinarily work so closely with the military, see section III, *infra,* that it is nearly impossible to contend that the contractor defectively designed a piece of equipment without actively criticizing a military decision. Civilian scrutiny of such decisions is generally exerted through executive and legislative oversight on behalf of the public at large, not, as here, through the judiciary at the behest of an individual serviceman. In cases such as these, "members of the armed services would be allowed to question military decisions and obtain relief from actions of military officials." *Bynum v. FMC Corporation,* 770 F.2d 556, 565 (5th Cir. 1985). Trial "would often require members of the Armed Services to testify in court as to each other's decisions and actions." *Stencel Aero Engineering Corp. v. United States,* 431 U.S. 666, 673, 97 S.Ct. 2054, 2059, 52 L.Ed.2d 665 (1977). While debate over the safety and necessity of advanced weaponry is essential, the First Amendment does not require that the forum be the courtroom or the vehicle be a lawsuit.

The disallowance of recovery in these actions will not leave servicemen or their survivors without relief. The Veterans' Benefits Act "provides a swift, efficient remedy for the injured serviceman." *Stencel,* 431 U.S. at 673, 97 S.Ct. at 2058. Thus one classic rationale for tort liability—that of compensation of victims—is less compelling in this context. While the Veterans' Act does not provide all elements of damages in the usual wrongful death action, recovery is more reliable, and not "reduced by the high transaction costs present in ordinary products liability litigation." *McKay,* 704 F.2d at 452, n.11.

Forcing military mishaps into the mold of products liability litigation carries one final drawback. Pilots of the Navy and Air Force, whose service and sacrifice make possible the security of this country, are not the military doubles of civilian motorists. Their lives are led in the company of peril. We can express it no better than Judge Sneed did for the court in *McKay:*

> [Pilots] recognize when they join the armed forces that they may be exposed to grave risks of danger, such as having to bail out of a disabled aircraft. This is part of the job. The Nation sometimes demands their very lives. This is an immutable feature of their calling. To regard them as ordinary consumers would demean and dishonor the high station in public esteem to which, because of their exposure to danger, they are justly entitled.

704 F.2d at 453.

III

The second set of reasons for the government contractor defense also has its roots in military soil. Permitting recovery for design defects under any theory of liability risks altering the nature of the procurement process. Specifically, we anticipate that in the absence of the defense, there would be a decrease in contractor participation in design, an increase in the cost of military weaponry and equipment, and diminished efforts in contractor research and development.

Contractor participation in design is essential to the development of a military force that is competitively equipped. Equipment designs often are the result of "continuous back-and-forth" between the military and the contractor. *Koutsoubos v. Boeing Vertol,* 755 F.2d 352, 355 (3d Cir.), *cert. denied,* ___ U.S. ___, 106 S.Ct. 72, 88 L.Ed.2d 59 (1985). The contractor and the military pool

their expertise, matching the latest advances in military technology with the specific dictates of the mission. We recognize this back-and-forth as a reality of the procurement process, as well as a valuable part of that process; indeed if military technology is to continue to incorporate the advances of science, it needs the uninhibited assistance of private contractors.

Here the testimony at trial indicated that Vought worked closely with the Navy in developing the specifications for the aircraft. Vought's project manager for the RF-8G program testified that the engineering change proposal that included the Buick Hood modification was "a continual source of discussion" between Vought and the Navy, and that Navy engineers visited Vought every few months for progress reviews. The contractor's participation in design—or even its origination of specifications—does not constitute a waiver of the government contractor defense. If the defense were to be waived by such participation, the contractor would be trapped between its fear of liability and its desire to provide needed ideas and information. The "incentives for suppliers of military equipment to work closely with and to consult the military authorities in the development and testing of equipment" would be lost. *McKay,* 704 F.2d at 450. Without the defense, "military contractors would be discouraged from bidding on essential military projects." *Bynum v. FMC,* 770 F.2d at 566. Thus the defense will be permitted to a participating contractor so long as government approval of design "consists of more than a mere rubber stamp." *Schoenborn v. Boeing,* 769 F.2d 115, 122 (3d Cir. 1985). If there is genuine governmental participation in the design, "the defense is available." *Id.*

Finally, disallowing the government contractor defense might raise the already high costs of military equipment. "Military suppliers, despite the governments immunity, would pass the cost of accidents off to the United States through cost overrun provisions in equipment contracts,

through reflecting the price of liability insurance in the contracts, or through higher prices in later equipment sales." *McKay,* 704 F.2d at 449. Such pass-through costs would, of course, defeat the purpose of the immunity for military accidents conferred upon the government itself. *Stencel,* 431 U.S. at 673, 97 S.Ct. at 2059. While distribution of the costs of mishaps to the consuming public may be a familiar feature of products liability law, we are loathe to grant courts and juries a similar power to swell the public costs of meeting the nation's requirements in national security. Though one court has speculated that tort liability would provide legal incentives for "better-designed planes and fewer costly accidents," *Shaw,* 778 F.2d at 742, that judgment is not a matter for the judicial economists but for the Executive in its dealings with contractors and for the Congress in defining the scope of immunities under the Federal Tort Claims Act.

IV.

There remains the application of the elements of the military contractor defense to the facts of this case. In *McKay,* the court held that

> a supplier of military equipment is not subject to [strict liability in tort] for a design defect where: (1) the United States is immune from liability under *Feres* and *Stencel*[2], (2) the supplier proves that the United States established, or approved, reasonably precise specifications for the allegedly defective military equipment, (3) the equipment conformed to those spec-

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[2] In *Feres v. United States,* 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), the government was held not liable under the Federal Tort Claims Act for injuries to servicemen in the course of military service. In *Stencel Aero Engineering Corp. v. United States,* 431 U.S. 666, 97 S.Ct. 2054, 52 L.Ed.2d 665 (1977), the United States was not required to indemnify a third party for damages paid by it to a member of the Armed Forces injured in the course of military service.

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> ifications, and (4) the supplier warned the United States about patent errors on the government's specifications or about dangers involved in the use of the equipment that were known to the supplier but not to the United States.

704 F.2d at 451.

There is no question that Vought qualifies for the government contractor defense under this test. It is undisputed that the United States was itself immune from liability and that the Buick Hood modification conformed to specifications. The jury specifically found that the Navy reviewed and approved "reasonably detailed specifications for the Buick Hood modification," and, further, that the contractor did not fail "to notify the Navy of dangers created by the specifications which were known to defendants but unknown to the Navy."

Nevertheless, the district court upheld the verdict for Tozer on the basis of the jury's findings that defects in the design of the Buick Hood proximately caused plaintiff's death. The district court considered the defense "applicable to a cause of action based on strict liability," but unavailable to a "government contractor who is alleged to have established negligent design specifications."

In so holding, the trial court was in error. The defense applies "equally well to design defect cases based on negligence and/or breach of warranty claims." *Tillett v. J.I. Case Co.*, 756 F.2d 591, 597 n. 3 (7th Cir. 1985); *see also Schoenborn.* The policies discussed earlier apply forcefully in either a negligence or a strict liability context. Courts are ill equipped to make military judgments, whatever a plaintiff's theory of recovery. In this case, the jury was instructed that the government contractor defense barred recovery on strict liability, in part to prevent second-guessing of military decisions. But the jury still was compelled to evaluate the negligence claim, and thereby second-guess a design that the United States Navy had sanctioned. The

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danger that contractors will participate less and charge more stems from the threat of liability for government-approved technology, not from the particular theory of recovery.

In holding that the government contractor defense bars recovery on a theory of negligence as well as strict liability, we join the growing ranks of circuit courts that recognize the utility of the defense and its inescapable function in the deflection of unwarranted judicial oversight over matters of procurement and defense.[3] *Koutsoubos v. Boeing Vertol,* 755 F.2d 352 (3d Cir. 1985); *Bynum v. FMC,* 770 F.2d 556 (5th Cir. 1985); *Tillett v. J.I. Case,* 756 F.2d 591 (7th Cir. 1985); *McKay v. Rockwell Int'l Corp.,* 704 F.2d 444 (9th Cir. 1983). *But see Shaw v. Grumman Aerospace,* 778 F.2d 736 (11th Cir. 1985). This case involves no more than a standard application of such principles. The judgment of the district court is accordingly reversed and remanded for entry of judgment in favor of defendants.

REVERSED AND REMANDED.

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[3] Though the cause of action here was brought under federal law, the defense would apply equally to suits under the diversity jurisdiction. "With regard to the government contractor defense, most of the courts that have considered the matter have found that, at least when military design specifications provided by the government are at issue, product liability actions are likely to involve matters that are subject to exclusive federal control and necessitate the limited imposition of federal common law." *Bynum,* 770 F.2d at 567, *et seq.* The fact that a claim arises under state law does not, of course, preclude a federal defense in an area of paramount federal interest. *Id.;* Note, *Government Contract Defense: Sharing the Protective Cloak of Sovereign Immunity After McKay v. Rockwell International Corp.,* 37 Baylor L.Rev. 181, 214 (1985).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil No. HM81-2134

JOAN S. TOZER, *et al.*
v.
LTV CORPORATION, *et al.*

MEMORANDUM AND ORDER

This is an action for wrongful death arising from the crash of a Navy aircraft on August 28, 1980. Plaintiffs, the surviving widow and two minor children of the decedent, (a Navy officer who was piloting the aircraft), alleged that the defendants negligently designed, manufactured and assembled a modification made to the subject aircraft. The suit, brought under the Death on the High Seas Act (DOHSA), 46 U.S.C. §761 *et seq.*, and under the general maritime law, sought damages based on the theories of negligence and strict liability. After a trial on the merits, the jury reached a verdict in favor of the plaintiffs and awarded $450,000.00 in damages for the pecuniary loss sustained. In response to written interrogatories, the jury found the defendants negligent in the design of the modification, and also found that the Navy had reviewed and approved reasonably detailed specifications for the modification.

The matter is presently before the court on defendants' motions pursuant to Rule 50(b) and 59(b), F.R.Civ.P., for judgment notwithstanding the verdict and in the alternative for a new trial. Also before the court is plaintiffs' motion for an award of prejudgment interest.

For the reasons stated herein, the court finds that defendants are not entitled to the relief sought in their motions. The court also finds that an award of prejudgment interest is appropriate in this case.

Judgment N.O.V.

The court may grant a motion for judgment N.O.V. only if it finds that the evidence was insufficient to permit the jury to rationally find as they did. *Miller v. Premiere Corp.*, 608 F.2d 973, 981 (4th Cir. 1979). In making this determination, the court must view the record in the light most favorable to the non-moving party and give that party the benefit of all reasonable inferences from the evidence. *Krotkoff v. Goucher College*, 585 F.2d 675, 677 (4th Cir. 1978). Having reviewed the grounds asserted by the defendants in their motion and having reviewed the evidence in this case, the court concludes that the jury's verdict in favor of the plaintiffs was rational and that none of the grounds asserted by the defendants affected their substantial rights.

Motion for New Trial

The standard for granting a new trial is similarly stringent. The court may grant a new trial only if the verdict is against the clear weight of the evidence; or if there were substantial errors in the admission or exclusion of evidence, or in the court's instructions to the jury, such that a miscarriage of justice would result if a new trial were not granted. *Wyatt v. Interstate and Ocean Transport Co.*, 623 F.2d 888, 891-92 (4th Cir. 1979). Having reviewed the evidence, the court finds that the verdict was not against the clear weight of the evidence. As set forth below, the court also finds that no errors affecting the substantial rights of the defendants occurred and that the interests of justice do not require the relief sought.

The court will address, in turn, each of the grounds asserted by the defendants in support of their motions.

Testimony of Dr. Charlie D. Turner

A. Motion in Limine

Defendants assert that the court erred in denying their motion in limine to preclude the testimony of Dr. Turner on the basis that plaintiffs were untimely in designating him as an expert. Dr. Turner was first designated as an expert in aeronautical engineering upon the filing of the proposed pretrial order on May 27, 1983, approximately five weeks prior to the start of trial. He was the only expert designated by plaintiffs in this field. On June 25, 1983, when Dr. Turner was first deposed by the defendants, he was unable to testify concerning his expert opinions in this case because he had not yet performed various studies, calculations and analyses which he deemed necessary. For this reason, the court conditioned its denial of the defendants' motion in limine on plaintiffs making Dr. Turner available to be deposed a second time. A second deposition in fact took place after the trial had commenced but prior to Dr. Turner's appearance as a trial witness.

Defendants assert that plaintiffs' untimely designation, after the discovery deadline and after three previous requests for identification of experts, amounted to a blatant lack of timeliness and a failure to comply with the Federal Rules of Evidence and the Local Rules of this court. In addition, defendants assert that Dr. Turner's inability to state his opinions during the first deposition effectively precluded any meaningful cross-examination of him, seriously prejudiced their ability to prepare for trial and necessitated the filing of the pretrial motion in limine.

The court finds that plaintiffs did not violate either the Federal Rules or the Local Rules of this court by designating their expert when they did. The directives regarding matters of discovery and designation of expert witnesses contained in the scheduling order and the notice of pretrial conference generally sent to counsel, including counsel in this case, are not entirely consistent. Those

documents required that matters of discovery be completed before the pretrial conference, yet also required that proposed expert witnesses be designated in the pretrial order. Therefore, the final designation of expert witnesses was not required until the order was submitted. Also, for the convenience of all counsel and with their consent and or acquiescence, the deadlines in this case were quite flexible. Moreover, both Rule 16 and Rule 26, F.R.Civ.P., which refer to pretrial and discovery procedures, provide that an order determining such matters may be modified if justice so requires.

It also does not appear to the court that the defendants were in fact prejudiced. Defendants were able to depose the expert prior to his trial appearance and to inquire about his expert opinions. There is no assertion that the claimed prejudice continued past this second deposition. Indeed, after the second deposition, defendants did not request a continuance or in any other manner indicate to the court that they were unprepared to cross-examine the expert adequately or present testimony in opposition. In addition, as the court noted in denying the motion in limine, since defendants had designed and built the airplane and the modification at issue, they had a unique access to information concerning this whole area of expertise which diminished any possible inconvenience, surprise or prejudice arising from the delay in learning about the opinions of plaintiffs' expert.

Exclusion of Dr. Turner's testimony under these circumstances would have contravened the "sound public policy" which requires that any sanction which interferes with the determination of cases on their merits "must be no more severe . . . than is necessary to prevent prejudice to the movant." *Wilson v. Volkswagen of America, Inc.*, 561 F.2d 494, 504 (4th Cir. 1977) (citations omitted). Consequently, the curt did not err when it refused to exclude the testimony of plaintiffs' expert, Dr. Turner.

B. Oral Motion to Strike

Defendants' assertion that the court erred when it failed to strike Dr. Turner's testimony as being based on speculation and conjecture also lacks merit. Dr. Turner's opinion testimony regarding the structural reaction of the modified Buick Hood panel to aerodynamic forces and loads experienced by the aircraft was sufficiently based on relevant facts or data of a type reasonably relied upon by experts in his field. Dr. Turner testified that he formed his opinion based on, among others, depositions of fact witnesses and defendants' experts, a pressure deflection analysis made by the defendants, other design data and calculations, and upon a physical examination of the aircraft. Rather than affecting the admissibility of the testimony, the objections raised by the defendants would more properly be the subject of argument to the trier of fact concerning the weight to be accorded the evidence. Because of the differences in the factual circumstances at issue, the cases cited by the defendants also do not support their contention. Consequently, the court finds that defendants have failed to show that the court's decision to deny the motion to strike Dr. Turner's testimony affected their substantial rights.

C. Rebuttal Testimony

Defendants submit that Dr. Turner's rebuttal testimony should properly have been offered during the plaintiffs' case-in-chief since it did not rebut any of the opinion testimony given by defendants' experts and therefore its admission in rebuttal was cumulative, unnecessary and prejudicial. Defendants also assert that permitting the expert a second opportunity to testify as to new assumptions and additional facts relied upon by him, was prejudicial because it circumvented the testimony of defendants' experts and effectively precluded defense testimony to meet this additional and new testimony.

The court finds no merit in these contentions. Since the court did not preclude defendants from putting on surrebuttal evidence, it is unclear to the court how defendants were prevented from countering Dr. Turner's rebuttal testimony. Nor is it clear to the court how such testimony was "new" in a material sense. Moreover, since defendants appear to concede that the testimony could properly have been offered during the plaintiffs' case-in-chief, their objection on this point is nearly frivolous and certainly not sufficient grounds for either a new trial or a JNOV. The Second Circuit, in a case cited by the defendants themsleves, disposed of a similar contention:

> The point as to the reception of evidence relates to the action of the court in permitting the introduction by appellee during his rebuttal of three depositions which it is admitted would have been properly received had they been offered by him while presenting his evidence in chief. This is a rather technical objection which, in the absence of surprise, of which none appears, deserves little notice. Assuming, without deciding, that the evidence was not admissible in rebuttal as of right, it might of course have been excluded. But whether to do that or to permit its introduction out of order is a matter of discretion, and no abuse of that has been shown.

Casey v. Seas Shipping Co., 178 F.2d 360, 362 (2d Cir. 1949) (citations omitted).

For all these reasons, the court finds that none of the rulings with respect to the testimony of Dr. Turner affected any of the defendants' substantial rights.

NASTRANS Computer Model

Defendants assert that the court erred in granting plaintiffs' motion in limine to preclude any use or reference by the defendants to the NASTRANS Computer Model,

an engineering study generated by the defendants. Although defendants had earlier informed plaintiffs that the computer model was being constructed, the model was not made available to plaintiffs until June 23, 1983, about two weeks prior to trial. The delay was caused by problems with computer access. Defendants assert that the model did not contain any new theory or factual basis but merely served as a refinement and support for the opinion of one of defendants' experts regarding the physical interaction and reaction of the Buick Hood panel structure with the aerodynamic forces applied to it under the relevant flight conditions. Defendants assert that the court's decision to permit the testimony of plaintiffs' expert, Dr. Turner, despite the claimed untimeliness of his designation, while at the same time denying defendants' use of the computer model was contradictory, manifestly unfair and prejudicial to defendants' right to a fair trial.

Because of the differing circumstances surrounding these two matters, the court believes that its rulings on them were proper. The NASTRANS model is a set of computer data generated by computer specialists. Defendants contracted for its production sometime in October, 1982. It was not completed until mid-June 1983, approximately seven and one-half months later. It is a lengthy document approximately one inch thick. The data is listed on pages approximately fifteen inches in width, and thirteen inches long.

At trial, the court considered the arguments of counsel on this matter and determined that introduction of the model would be unduly prejudicial to the plaintiffs because it was produced within such a short time before trial. On the other hand, since the substance of the evidence that was contained in the model was presented to the jury through the testimony of defendants' expert, exclusion of the model did not similarly prejudice the defendants. The court considered that plaintiffs would require a lengthy period of time to prepare to meet the esoteric and highly

technical data contained in the lengthy computer model with countervailing evidence. This would have necessitated a substantial continuance of the trial, possibly as long as the seven or eight months required to generate the model. Under these circumstances, including also the attendant expense of meeting such evidence at that late time, the court excluded the evidence. No similar burdens were placed on defendants in adequately preparing to meet the testimony of Dr. Turner.

Accordingly, defendants have failed to show any substantial prejudice arising from this court's ruling on this matter which would entitle them to the relief sought.

Jury Instruction

The final ground asserted by the defendants is that the court erred in instructing the jury that the government contractor defense applied only with respect to the strict liability claim and not with respect to the negligence claims. In requesting the broader instruction at trial, defendants relied solely on *McKay v. Rockwell International Corp.*, 704 F.2d 444 (9th Cir. 1983).

From the outset, plaintiffs vehemently opposed the assertion of the government contractor defense by the defendants as to all claims. Although it is an affirmative defense, defendants failed to timely assert it in their answer to the complaint. Instead, at the pretrial conference held in May 1983, five weeks prior to trial, defendants first raised the issue by asking the court for permission to file a motion for summary judgment on the basis of the defense. Defendants asserted that their delay in asserting the defense was primarily due to the fact that the *McKay* case, which was the sole authority cited in their motion, had only recently been decided in April 1983. Under those circumstances, the court granted defendants permission to file the motion. Thereafter, the court denied plaintiffs' motion to strike the defense as untimely and

also denied the defendants' motion for summary judgment because there existed issues of material fact.

The government contractor defense, which insulates a government supplier from liability for acts done while complying with government specifications in the performance of a government contract, was first adopted by the Supreme Court in *Yearsley v. W. A. Ross Construction Co.*, 309 U.S. 18 (1940). In *McKay*, the Ninth Circuit for the first time extended the application of the defense to a case where the design specifications had been established by the contractor rather than by the government, provided that the contractor could prove, among other things, that the government had approved "reasonably precise specifications." 704 F.2d at 451. *McKay* is the only case brought to the court's attention by the parties and by the court's own research, where the defense had been applied in a situation where, as in the instant case, the design specifications were not established by the government.

The *McKay* court, however, found the defense applicable to a cause of action based on strict liability. Since the applicability of the defense with respect to negligence claims was not before the court, the *McKay* court did not address that issue. Defendants have not provided any authority to support their contention that the defense is available to a government contractor who is alleged to have established negligent design specifications.

To the contrary, the authorities indicate that the defense is intended to insulate a government contractor from liability for negligence attributable to the government, and not to the contractor itself. *Brown v. Caterpillar Tractor Co.*, 696 F.2d 246, 253 (3d Cir. 1982). Under *McKay*, the defense may also insulate a contractor from liability in strict liability claims where no negligence on the part of either the government or the contractor need be shown. In cases where the contractor is negligent in manufacturing a product or in otherwise performing its duties under

a government contract, courts have uniformly held that the defense would not insulate the contractor from liability. *Johnston v. United States,* 568 F. Supp. 351, 356 (D. Kan. 1983). *See also* Annotation, *Right of Contractor with Federal, State or Local Public Body to Latter's Immunity from Tort Liability,* 9 A.L.R. 3d 382, 397 §5 (1966).

The government contractor defense has been described as allowing ". . . the contractor to 'share' the government's immunity from suit on grounds of public policy." *Johnston v. United States,* 568 F. Supp. at 356, quoting Note, *Liability of a Manufacturer for Product Defectively Designed by the Government,* 23 B.C.L. Rev. 1025, 1031-32 (1982). Where the injury-causing aspect of the product was neither designed by the government, nor mandated or compelled by the government contract, there does not appear to exist any sound public policy for immunizing the contractor for his own negligent acts. *See e.g., Brown v. Caterpillar Tractor Co.,* 696 F.2d at 253-54; *Johnston v. United States,* 568 F. Supp. at 356-360. As the district court in the Agent Orange litigation explained:

> Behind [the government contractor defense] lie considerations of fairness and public policy . . . [T]ort liability principles properly seek to impose liability on the wrongdoer whose act or omission caused the injury, not on the otherwise innocent contractor whose only role in causing the injury was the proper performance of a plan supplied by the government. The imposition of tort liability on a wrongdoer can have a strong prophylactic effect; tortfeasors held liable for damages that flow from their wrongdoing have a strong incentive to prevent the occurrence of future harm. . . . Before any societal benefit can be derived from the deterrent effect of tort liability, however, the party in a position to correct the tortious act or omission must be held accountable

> for the damages caused and thus motivated to prevent future torts.

In re "Agent Orange" Product Liability Litigation, 506 F. Supp. 762, 793-94 (E.D. N.Y. 1980)(citations omitted).

In all the cases reviewed by the court, the government contractor defense immunized a non-negligent contractor to the same extent as the government was immunized. Here, defendants are asking the court to extend that immunity to a negligent contractor merely because the government in approving the detailed specifications established by the contractor somehow adopted the contractor's negligent design, and thereby made the negligence its own. Extending the defense to shield a tortfeasor from liability for damages that flow from his own wrongdoing does not appeal to this court's sense of justice nor does such a result appear to be required by any of the policies considered by courts in applying the defense.

The instruction to the jury limiting the availability of the government contractor defense to the strict liability claim was not, therefore, erroneous.

Accordingly, the court finds that the interests of justice do not require that a judgment notwithstanding the verdict be entered, nor that a new trial be granted. In exercise of its discretion, the court will deny the motions.

Prejudgment Interest

When the court entered judgment in this case, it reserved the issue of prejudgment interest for future determination. Plaintiffs have filed a memorandum of law in support of such an award and a reply to the opposition filed by the defendants. Having carefully considered the matter, the court in its discretion will award prejudgment interest as set forth below.

Defendants assert that prejudgment interest should not be awarded: 1) because interest should not accrue until

the amount of liability is finally determined by the jury verdict and subsequent judgment; 2) where the recovery is for intangible elements not susceptible of precise measurement such as bodily harm and emotional distress; and 3) where the jury award was intended to be comprehensive and judgment was obtained with minimal delay.

An award of prejudgment interest in appropriate in this action to compensate fairly and justly the wife and minor children of the decedent for the pecuniary loss sustained by them. The fact that unliquidated tort damages are involved and that therefore the proper measure of those damages was not determined until the verdict was returned does not preclude the award of prejudgment interest where one is appropriate to provide full and fair compensation to the plaintiffs. *Norfolk Shipbuilding & Drydock Corp. v. M/V LA BELLE SIMONE,* 537 F.2d 1201, 1204-05 n. 1 (4th Cir. 1976). Nor do any of the other reasons asserted by the defendants require a contrary result. In this respect, the reasoning of the court in *Stoddard v. Ling-Temco-Vought, Inc.*, 513 F. Supp. 314, 331 (C.D. Cal. 1981), bears quoting:

> Pre-judgment interest in DOHSA cases is not an element of punitive damages assessed only against a defendant who uses delay tactics. Prejudgment interest, rather, is assessed pursuant to the statutory mandate that plaintiffs in DOHSA actions receive fair and just compensation for the pecuniary loss sustained by the heirs and descendants. Defendants had the use of the death award during the period between the plane crash and the filing of the complaint, and are now ". . .in a poor position to complain when required to pay interest on it."

(citation omitted).

The court finds that the rate of interest which would best provide full and fair compensation to the plaintiffs in

this case is a "rate equal to the coupon issue yield equivalent (as determined by the Secretary of Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of judgment." 28 U.S.C. §1961(a). Although §1961 is applicable only to post-judgment interest awards, the court will apply the rate here because in the court's judgment, it best reflects the fair value of the loss sustained. The award of prejudgment interest shall be awarded from August 28, 1980, the date of the death of Lt. Commdr. Eliot F. Tozer. *See Id.* at 332 n.2.

Accordingly, for all the foregoing reasons, it is this 25th day of July 1984, by the United States District Court for the District of Maryland,

ORDERED:

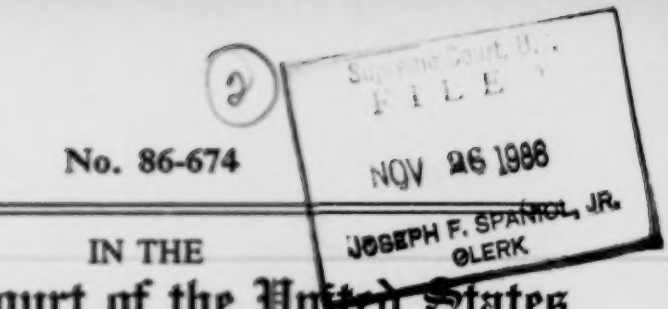
(1) that defendants' motion for judgment notwithstanding the verdict, be, and the same hereby is, *Denied;*

(2) that defendants' motion for new trial be, and the same hereby is, *Denied;*

(3) that prejudgment interest be, and the same hereby is, awarded at the rate set forth in 28 U.S.C. §1961(a) from August 28, 1980; and

(4) that the Clerk of the Court mail copies of this memorandum and order to the parties.

/s/ HERBERT F. MURRAY
United States District Judge



No. 86-674

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JOAN S. TOZER, KATHERINE S. TOZER, LINDSAY M. TOZER,

Petitioners,

v.

LTV CORPORATION, JONES & LAUGHLIN INDUSTRIES, INC., VOUGHT CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS,
FOURTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 86-674

IN THE

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October Term, 1986

JOAN S. TOZER, KATHERINE S. TOZER, LINDSAY M. TOZER,

Petitioners,

vs.

LTV CORPORATION, JONES & LAUGHLIN INDUSTRIES, INC., VOUGHT CORPORATION,

Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The respondents accept the petitioners' account of the proceedings below.

STATEMENT OF THE CASE

On August 28, 1980, Lt. Commander Eliot Tozer was killed while on active duty when a United States Navy RF-8 reconnaissance aircraft crashed off the coast of California, after being launched from the aircraft carrier, U.S.S. Kitty Hawk. The aircraft was executing a low altitude, high speed fly-by off the carrier when the incident occurred. Plaintiffs

sought relief against the defendants at trial, under the Death On The High Seas Act (DOHSA), 46 U.S.C. §§ 761-768 (1920), and General Maritime Law, alleging a defect in the design of a modification to the aircraft.

The subject of the alleged defective modification was an access panel known as the "Buick Hood". Pursuant to a contract with the United States Navy, the Buick Hood had been modified by the defendants. It was plaintiff's contention that the Buick Hood came loose during the flight, causing the aircraft to lose control and ultimately crash. The jury returned a verdict in favor of plaintiffs on theories of negligence and strict liability for the design of the subject modification.

Defendants contended at trial that the government contractor defense barred plaintiff's claims for damages. The jury was instructed as to the four elements necessary to establish the government contractor defense as set forth in *McKay v. Rockwell International Corp.*, 704 F 2d 444 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

The jury was instructed that two of those elements were uncontested: namely, that the United States was immune from any claim by the plaintiffs, and, second, that the Buick Hood conformed to its designed specifications. The jury then found that the U.S. Navy did review and approve reasonably precise specifications for the Buick Hood modification. Further, the jury concluded that defendants did not fail to notify the Navy about any dangers in the design which were known to defendants, but not to the Navy. Thus all four elements of the government contractor defense were established by defendants.

The court, however, instructed the jury that the government contractor defense only applied to plaintiff's strict liability cause of action and would not bar plaintiff's

negligence claim. Thus, despite defendant's objection to such a limitation, a plaintiff's verdict was rendered on the negligence cause of action.

On appeal, the Fourth Circuit reversed the lower court's decision based on a separation of powers theory, and held that the government contractor defense, if proven, properly operates to preclude both negligence and strict liability claims.

SUMMARY OF ARGUMENT

Although petitioners argue that the decision of the Fourth Circuit in this case is in conflict with decisions from the Third, Fifth, Seventh, Ninth and Eleventh Circuits on the issue of the application of the government contractor defense, such conflict is illusory in that regardless of the formulation of the defense enumerated by the Circuits, they are all calculated to reach the same ultimate conclusion. Further, there is no question among the Circuits that the Government contractor defense applies equally to both negligence and strict liability claims.

Moreover, even if it should be determined that there exists a variance among the Circuits in legal interpretation and application of the defense, the instant case is not an appropriate case to help reconcile this conflict as the outcome of the case will remain the same regardless of the interpretation of the defense applied to the facts of this case. It is therefore respectfully submitted that the instant case is inappropriate for review by this Court.

ARGUMENT

I. INTRODUCTION

The decision below, holding that the government contractor defense is equally applicable to both negligence and strict liability claims is correct, as is the court's determination that the defendants herein are immune from liability under the defense. There is no real conflict between this holding and those rendered by other Circuit Courts of Appeal. Nor is there any other basis for further review of the instant case by this Court.

It is petitioners' contention that present judicial positions concerning the government contractor defense are so diverse and uncertain that review by this Court is necessary to resolve the confusion among the Circuits. However, a closer reading of recent decisions regarding this defense reveals that the Fourth Circuit's decision in the instant case is not inconsistent with what has been decided in other cases involving the government contractor defense.

II. CERTIORARI IS NOT APPROPRIATE IN THE INSTANT CASE AS REGARDLESS OF THE CIRCUIT DECISION APPLIED TO THE INSTANT CASE THE OUTCOME WILL REMAIN THE SAME, THUS, ANY ALLEGED CONFLICT BETWEEN THE DECISION IN THE INSTANT CASE AND OTHER CIRCUIT COURTS OF APPEAL IS ILLUSORY.

Petitioner's principal argument in support of their writ is that the decision in the instant case is in direct conflict with *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736 (11th Cir.

1985). It is petitioners' contention that the Eleventh Circuit in *Shaw* rejected the approach to the government contractor defense as set forth in *McKay*, 704 F.2d at 451, and held the manufacturer liable for its negligence in failing to fulfill its duty of due care in the design of a modification of an A-6 bomber aircraft, despite the fact that the Navy may have approved the precise specification for purchase.

Although it is true that the test formulated by the court in *Shaw* is different from the elements of the government contractor defense as stated in *McKay*, both tests are reasonably calculated to produce the same result, namely, to determine responsibility for the defective design. In fact, in reaching its decision for plaintiff, the lower court in *Shaw* applied the government contractor defense as set forth by the court in *McKay*, but found that defendant did not prove the elements of the defense, thereby reaching the same result ultimately reached by the Eleventh Circuit on appeal

In fashioning its interpretation of the government contractor defense, the Eleventh Circuit Court in *Shaw* expressed its central concern as being whether the United States had actually made an informed decision to use a particular military product despite knowledge of the inherent risks to servicemen. The court further held that the government contractor defense "is available in certain situations not because a contractor is appropriately held to a reduced standard of care, nor because it is cloaked with sovereign immunity, but because traditional separation of powers doctrine compels the defense." *Shaw*, 778 F.2d at 740. In emphasizing this point, the court quoted Judge Pratt in *In Re "Agent Orange" Product Liability Litigation*, 534 F.Supp. 1046, 1054 n.1 (E.D.N.Y. 1982) as follows:

> The purpose of a government contract defense . . . is to permit the government to wage war in

> whatever manner the government deems advisable, and to do so with the support of suppliers of military weapons. Considerations of cost, time of production, risks to participants, risks to third parties, and any other factors that might weigh on the decisions of whether, when, and how to use a particular weapon, are uniquely questions for the military and are exempt from review by civilian courts.

Shaw, 778 F.2d at 740.

The court then added that "the purpose of such a defense is not only to permit the government actually to 'wage war', but also to prepare for war. . . ." *Id.* Thus, the court recognized a government contractor defense based on the rationale that the constitutional separation of powers requires the judiciary to defer to military decisions to use a weapon designed by an independent contractor, despite its risks to servicemen.

Therefore, as stated, the court held that the proper question for the court to determine was whether such a decision had actually been made by the military. This rationale and formulation of the central inquiry behind the defense is precisely the same as that applied in the instant case.

Like *Shaw*, the Fourth Circuit Court in the instant case recognized that application of the defense to military contractors requires the consideration of separation of powers. Further, the Fourth Circuit in the instant case stated:

> [E]ven apart from matters of constitutional text, the reservation of judicial judgment on strictly military matters is sound policy. The judicial branch contains no Department of Defense or

> Armed Services Committee or other ongoing fund of expertise on which its personnel may draw. Nor is it seemly that a democracy's most serious decisions, those providing for common survival and defense, be made by its least accountable branch of government.

Tozer v. L.T.V. Corp., 792 F.2d 403, 405 (4th Cir. 1986). Thus, it is readily apparent that both the Fourth and Eleventh Circuits agree that decisions concerning defense questions made by the military should be accorded the utmost of deference by the judiciary system. It is also clear that the government contractor defense as set forth by the Fourth and Eleventh Circuit seeks to provide immunity to government contractors only for *decisions concerning design specifications and modifications actually made by the military.*

In the instant case, the Fourth Circuit Court held the supplier of military equipment immune from a liability where:

> 1) The United States is immune from liability under *Feres* and *Stencel*, 2) the supplier proves that the United States established, or approved, reasonably precise specifications for the allegedly defective military equipment, 3) the equipment conformed to those specifications, and 4) the supplier warned the United States about patent errors in the government's specifications or about the dangers involved in the use of the equipment that were known to the supplier but not to the United States.

Id. at 408 (quoting *McKay*, 704 F.2d at 451).

At trial, the jury found that all elements of the defense were met by defendant, but the jury was instructed by the

lower court that the defense was only properly applied to plaintiff's strict liability claim. Subsequently, the Fourth Circuit Court ruled that the defense was equally applicable to plaintiff's negligence claim.

In *Shaw*, plaintiff's asserted claims of strict liability, negligence and breach of warranty. The lower court therein found that defendants had not met the elements of the defense as set forth in *McKay* and followed in *Tozer*. On appeal, the Eleventh Circuit held:

> As a general rule, the military contractor will be liable, as is any other contractor, to servicemen injured by defects. . . . [A] contractor may escape liability if it affirmatively proves: (1) that it did not participate or participated only minimally in the design of those products or parts of products shown to be defective; *or* (2) that it timely warned the military of the risks of the design and notified it of alternative designs reasonably known by the contractor, *and* that the military, although forewarned, clearly authorized the contractor to proceed with the dangerous design.

Shaw, 778 F.2d, at 746. (Emphasis original).

The court then went on to explain element 2 of the defense, stating:

> Reasonable knowledge is *not* synonymous with omniscience. A risk is reasonably known when it is either actually known, or reasonably ought to be known given good design practice in the industry.

Id.

Finally, in its interpretation of the defense the Eleventh Circuit made no distinction in the application of the defense

to claims of strict liability, negligence or breach of warranty.

After articulating its version of the government contractor defense, the Eleventh Circuit Court in *Shaw* proceeded to apply it to the facts of the case before it. In going so, the appellate court relied on the finding of the trial court that the defendant was responsible for the design alteration. Thus, the court continued on in order to determine if the second element of the test had been met, stating:

> Element two provides that a military contractor may still defend itself against liability if it timely informed the military of the design risks and alternatives *reasonably known to it*, and if the military, so warned, clearly authorized the contractor to proceed.

Shaw, 778 F.2d at 747. (Emphasis added.)

Once again, the court relied on the finding of the trial court holding that the defendant knew of the defect and failed to warn the Navy. The trial court further noted that the defendant was both actually aware and reasonably should have been aware, given good design practice, of the risk involved in the design, and the Navy did not have sufficient expertise to render a warning of that risk unnecessary.

Thus, although the Eleventh Circuit redesigned the elements necessary to establish the defense, it is clear that the basis for holding the defendant liable was in fact no different than that applied by the trial court in *Shaw*: namely, that the defendant was unable to meet the elements of the *McKay* defense. Therefore, the Eleventh Circuit's conclusion that the Navy's approval of the specifications and design changes did not constitute the sort of informed military decision to accept the risk of a dangerous product

to which this court must defer under the separation of powers doctrine, would have been reached irrespective of the formulation of the defense followed.

That the two tests in reality reach the same final conclusion was also noted in the recent decision of *Trevino v. General Dynamics Corp.*, 626 F.Supp. 1330 (E.D.Tx. 1986). In that case, survivors of five Navy divers who died from vacuum-induced bends while in a submarine's hangar diving system sued the military contractor who designed the system. The defendants therein argued that the government contractors defense protected them from any liability to the plaintiffs. In holding the defendants liable to plaintiffs for their negligence, the *Trevino* court applied the four-prong test set forth in *McKay* and followed by numerous other Circuit Court decisions. *Bynum v. F.M.C. Corp.*, 770 F.2d 556 (5th Cir. 1985); *Tillett v. J. I. Case Co.*, 756 F.2d 591 (7th Cir. 1985); *Koutsoubos v. Boeing-Vertol*, 755 F.2d 352 (3d Cir.), *cert denied*, ___ U.S. ___, 106 S.Ct. 72 (1986).

However, in applying the test, the court found that it was the defendants and not the Navy that "established reasonably precise specifications" for the diving system, and further, that defendants failed to warn the Navy of the danger of design deficiencies in the Navy's general requirements. Accordingly, the court held the government contractor defense would not shield defendants from liability.

Subsequent to the time this order was prepared, but prior to filing, the Eleventh Circuit handed down its decision in *Shaw*. Although the *Trevino* court recognized that *Shaw* set forth a different set of guidelines to establish the government contractor defense, it elected not to change its holding as both tests were "reasonably calculated to produce the same result: to place liability upon the party

ultimately responsible for the defect." *Trevino*, 626 F.Supp. at 1344. In further support of the determination that the two tests ultimately reached the same final conclusion, the court in *Trevino* stated "*nothing in the Judge Johnson (Shaw) decision is inconsistent with what has been done in this case.* Here, no such informed decision was made by the United States Navy. . . . [L]iability has been fairly placed upon the party 'ultimately responsible for the design defect' ". *Id.* (Emphasis added).

Such would also be the result in the instant case, as it is clear that the objective and ultimate outcome in applying the two tests is the same. First, there can be no question that the modificatin of an RF-8 reconnaissance aircraft invokes a separation of powers question required under *Shaw*, just as the modification of an aircraft in the *Shaw* case was clearly part of a "weapons system".

Secondly, the ultimate result sought under both formulations of the test, namely, to determine the party responsible for the design defect, will also not change. The conclusion that the Navy was responsible for the defect in the design modification must remain the same under the application of either test. This is the only possible determination as the jury in the lower court action found that the Navy required defendants to design a modification to the aircraft, and said modification involved continual back-and-forth discussion between defendants and the Navy, and finally, the Navy exercised final authority over the design of the Buick Hood. Also, the jury specifically found that the contractor did not fail to notify the Navy of any danger created by the modifications which were known to defendants but unknown to the Navy. Thus, as it has been unequivocally held that defendants were not "ultimately responsible for the design defect", it is clear that there is no

real conflict between the decisions reached by the Eleventh and Fourth Circuit.

Further, even if it were to be determined that there exists a conflict between the various forms of the government contractor defense, review of the instant case is unnecessary as the same outcome would result, regardless of the form of the defense applied.

As the jury at the trial below held that defendants had established compliance with all four elements of the government contractor defense, as set forth by *McKay*, there can be no argument that defendants have not met the defense as stated by the court in *In Re Agent Orange*. If the two formulations are different at all, it is that the *Agent Orange* test does not include a determination, as does *McKay*, that the government is immune from liability under the Feres/Stencel doctrine. In fact, it has been held that in reality the *McKay* court merely rephrased the *Agent Orange* test to specifically state what the *Agent Orange* test only implied. *Koutsoubos*, 755 F.2d at 355.

Finally, with regard to the defense as phrased in *Shaw*, it is clear that defendants in the instant case have also met any requirements necessary to the availability of the defense. As the jury specifically found that the Navy required defendants to design a modification to the aircraft and that request resulted in continuous discussions between defendants and the Navy, with the Navy having final approval over the modifications, it is clear that the defendants participated only minimally in the design of the modification, thus meeting the first element of the defense.

However, even if one assumes, *arguendo*, that defendants did not meet the first element, they clearly met the second element, which would also relieve the defendants of liability. The second element requires that the manufacturer

timely warn the military of risks of which they are reasonably aware and of alternative designs which are reasonably known by the contractor, and even though forewarned, the government authorizes the contractor to proceed with the design. *Shaw*, 778 F.2d at 746.

The fulfillment of this element by defendants was conclusively determined by the jury in the trial court below. Therein, the jury specifically determined that the contractor did not fail to notify the Navy of any dangers created by the design specifications which were reasonably known by defendants but not known by the Navy. Further, it was determined that the Navy, informed of all information known by defendants, reviewed and approved the Buick Hood modification. Thus, irrespective of whether it be determined that the defendants have satisfied the first element of this defense, it is manifestly apparent that they have complied with the second. It is therefore clear that there is no need for this Court to review the instant case, as the decision reached below would remain the same regardless of which formulation of the defense is ultimately applied to the facts of the case.

Petitioners also contend that the holding in the instant case is in conflict with decisions in the Third, Fifth, Seventh and Ninth Circuits insofar as the court in the instant case held that the government contractor defense applied to negligence as well as strict liability claims.

The first case to comprehensively analyze the elements and rationale of the government contractor defense in a military context was the *In Re Agent Orange* decision. Therein, defendants contended that they should not be held responsible for injuries arising from the government's use of Agent Orange during the Vietnam War since defendants had manufactured the chemical under contract with the

government and in compliance with its specifications. The court therein emphatically refused to distinguish between negligence and strict liability for purposes of applying the government contractor defense.

The court in *Agent Orange* firmly rejected plaintiff's contention that any involvement by the contractor in setting the specifications should defeat the defense. The court held that "all that is necessary on this element of the defense is for the defendant to prove that the product it supplied was a particular product specified by the government." *In Re Agent Orange*, 534 F.Supp. at 1056. Thus, the *Agent Orange* court would shield a contractor from liability even though the contractor participated in the allegedly negligent design.

Petitioners also argue that since the *McKay* court applied the government contractor defense to a strict liability cause of action, it is uncertain whether the Ninth Circuit intended that a defendant who is found to have breached a duty of due care causing a death or injury should be immune from liability for its negligent conduct. However, the *McKay* court did apply the government contractor defense to claims based on negligence as well as strict liability

The court discussed at length the applicability of the government contractor defense to plaintiff's claims under §§ 388 and 389 of the Restatement Second of Torts, for breach of a "duty to test, measure or evaluate the dynamics of the ejection process on the head, helmet and neck of the ejecting crewmen. . . ." *McKay*, 704 F.2d at 453. The court felt that many of the same reasons for applying the defense to strict liability claims also applied when considering these claims based on negligence principles. As the *McKay* court applied the government contractor defense to plaintiff's claims under §§ 388 and 389 of the Restatement, it is clear that said *McKay* court *did intend* that the government

contractor defense apply to both negligence and strict liability claims.

Implying the existence of a conflict with the Seventh Circuit, petitioners cite the decision of *Tillet v. J. I.Case Co.*, 756 F.2d 591 (7th Cir. 1985). In support of their contention petitioners argue that the court's decision did not indicate that the Seventh Circuit would allow a manufacturer to be summarily protected from the consequences of its own negligence. However, in *Tillet*, even though the specifications were later approved by the government, it was the defendant that deviated from the initial specifications provided by the government. The court then held that the reasoning in *McKay* would apply equally well to design defect cases based on negligence and/or breach of warranty. Thus, it is clear that any conflict between the Seventh and Fourth Circuits in applying the government contractor defense to negligent design defects as well as strict liability claims is indeed illusory.

Further, the petitioners have alleged that the application of *McKay* in the Third and Fifth Circuit Court decisions is uncertain, and in conflict with the holding in the instant case. It is petitioners' contention that these Circuit Courts have not yet applied the government contractor defense to a manufacturer who had a significant role in the origination and development of designs and specifications. However, in the latest decision reached by the Third Circuit, *In Re Air crash Disaster at Mannheim, Germany*, 769 F.2d 115 (3d Cir. 1985), *cert. denied*, ___ U.S. ___, 106 Sup.Ct. 851 (1986), the court agreed with the earlier Third Circuit case of *Koutsoubos*, 755 F.2d at 352, and held that the government contractor defense is available to a contractor that participates in the design of the product, so long as the government's approval consists of more than a mere

"rubber stamp". Such was also the holding in a recent Fifth Circuit case, *Bynum v. F.M.C.*, 770 F.2d at 556, which required genuine government participation in the design before the defense would be available.

Rather than disagree with these decisions, the court in the instant case relied on these decisions to help establish what was required in order to prove that the government had established reasonably precise specifications for the allegedly defective military equipment. In fact, the Third Circuit Court in *Koutsoubos* noted that the district court found a "*continuous back and forth relationship* between Boeing and the Navy with the *Navy always, expectedly and properly, having the responsibility for and exercising responsibility for making final decisions as to the specifications.*" *Koutsoubos*, 755 F.2d at 355. (Emphasis added). The court in *Koutsoubos* determined that this was sufficient evidence to establish that the government's participation in the design was more than a mere "rubber stamp".

This very same finding was also reached by the Fourth Circuit in the instant case, which held that the continuous discussions between defendants and the Navy and the Navy's responsibility for making the final decisions was sufficient to invoke the government contractor defense. It is therefore difficult to envision the conflict that petitioners have alleged exists between the Third, Fourth and Fifth Circuit Courts.

Finally, as already stated, the Eleventh Circuit in *Shaw* made absolutely no distinction between the application of a government contractor defense to claims for strict liability, negligence or breach of warranty. As such, it is apparent that the conflict petitioners have alleged to exist between the Circuit Court decisions with regard to the application of

the government contractor defense to claims of negligence is purely illusory.

CONCLUSION

For all the reasons set forth above, the respondent herein submits that plaintiffs' petition for a writ of certiorari should be denied by this honorable court.

Respectfully submitted,

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